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No. 238

In The

Supreme Court of the United States

October Term, 1960

H. A. Lott, Lee Blocker and Loren D. Frazier,
Petitioners,

v.

The United States of America,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

PRELIMINARY STATEMENT

Practically all contentions raised in the Government's brief are completely answered in the original brief for Petitioners. This reply brief will be limited to a few points in rebuttal, with repetition of matters covered in the original brief being avoided.

REPLY TO GOVERNMENT'S ARGUMENT

f.

The notices of appeal were timely filed (Reply to U.S. Br. pp. 9-24):

1. The notices of appeal were filed within the time limits plainly prescribed by Rule 37(a)(2).

There is no satisfactory answer to Petitioners' reliance upon the unequivocal language of Rule 37(a)(2). The essence of the Government's argument is that, when there is ambiguity or conflict among various Rules of Criminal Procedure, the rules should be "harmonized" in a manner which would limit and restrict the important right of appeal — rather than be "harmonized" in an equally logical manner which would resolve the ambiguity or conflict in favor of the appeal and adhere to the plain terms of the rules. Justice requires the latter approach.

It is apparent that the Government's position is both complex and unreasonable, rather than simple and fair as required by Rule 2. Furthermore, even if the Government's argument on "harmony" were well taken, the price for harmony is too high if it can be had only at the expense of simplicity in the administration of criminal justice — particularly when it creates a virtual trap for the accused, as would be the case here.

2. Entry of the pleas of nolo contendere did not constitute a "determination of guilt."

No case has been found which holds that a plea of *nolo contendere* constitutes a "determination of guilt" within the meaning of Rule 34. It is not even clear that a plea of guilty would constitute a "determination of guilt", within the meaning of such rule. But, in any event, the record

in this case shows that there was *no* "determination of guilt" in any sense until after the Farnsworth trial, when sentences were pronounced. The District Judge in legal effect rejected the pleas of *nolo contendere* and made his "determination of guilt" on the basis of evidence adduced at the Farnsworth trial. Since the *nolo* pleas were rejected, they could not constitute a "determination of guilt."

The Government's reliance, U.S. Br. 12, upon the Notes of the Advisory Committee under Rule 34, to the effect that it "continues existing law except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days," is misplaced. With respect to its Notes, the Advisory Committee stated:

> "The Notes are not to be regarded as a part of the Rules. They have been prepared without supervision or revision by the Supreme Court, and are not approved or sponsored by the Court. They have no official sanction and are intended merely as suggestions and guides."[1]

The Government's argument, U.S. Br. 15, that Petitioners' construction "would mean that Rule 37 has in effect rendered the five-day limits of Rules 33 and 34 without any meaning at all" is entirely fallacious. Plainly, the 10-day period — *specifically* provided by Rule 37(a)(2) — is necessarily applicable only for the *limited purpose* of determining the timeliness of an appeal under Rule 37(a)(2). For all other purposes, the 5-day limits of Rules 33 and 34 may properly be deemed controlling.

[1] Introductory statement by the Advisory Committee contained in Senate Document No. 175, 79th Congress, 2d Session, ordered to be printed April 26, 1946, Rules of Criminal Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States, together with Notes to the Rules as prepared under the direction of the Advisory Committee on Rules for Criminal Procedure appointed by the Supreme Court of the United States, United States Government Printing Office, 1946.

3. In any event, the appeals were timely under Rule 12(b)(2).

The Government's argument, U.S. Br. 19-23, that Rule 12(b)(2) is inapplicable, is in flagrant opposition to the plain terms of the rule — like its argument directed at Rule 37(a)(2). Rule 12(b)(2) requires that failure of the indictment to charge an offense "shall be noticed by the court at any time during the pendency of the proceeding." This is not difficult or ambiguous language of the sort which calls for *interpretation* by reference to history or background. Clearly a proceeding is "pending" until a judgment entered therein is either affirmed by the Supreme Court or becomes final by expiration of the time for appeal. *Hotch* v. *United States*, 208 F. 2d 244, 250 (9 Cir. 1953); *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 858 (8 Cir. 1952), *cert. den.* 343 U.S. 942; cf. *Snyder* v. *Buck*, 340 U.S. 15, 20 (1950); *Gulf Refining Co.* v. *United States*, 269 U.S. 125, 137 (1925); *Mackenzie* v. *Engelhard Co.*, 266 U.S. 131, 142-143 (1924). In this case the "motions in arrest of judgment" were made well before the judgments could possibly have become final by expiration of the time for appeal, since they were made 1 day after entry of the judgments and 4 days after the sentences were pronounced (R. 60-66, 68).

The fact that the Act of June 29, 1940, c. 445, 54 Stat. 688, was mentioned in the order of this Court adopting Rules 1 through 31 is not of controlling significance. See 323 U.S. 821. The language of the last sentence of Rule 12(b)(2) is clear and unequivocal, and promulgation of it by this Court was authorized by the Criminal Appeals Rules Act of 1933, as amended, c. 119, 47 Stat. 904; 18 U.S.C. (1946 ed.) 688.

Frankly admitting that *all* the decided cases under Rule 12(b)(2) are against it, U.S. Br. 22n.8, the Government

argues that the decisions are wrong because under them Rule 12(b)(2) and Rule 34 cover the same ground, in part. The Government would have this Court disregard and, in effect, strike out the plain terms of one rule merely because another rule grants similar relief in more limited form. We say that both rules should be given effect; that a defendant is entitled to rely upon *either* rule when its plain terms are applicable to his situation.

4. Alternatively, the appeals were timely under 28 U.S.C. §2255.

The only case in point compels the conclusion that Petitioners were legally in "custody" for purposes of 28 U.S.C. §2255, if their direct appeals were not timely. *Black* v. *United States*, 269 F. 2d 38, 41 (9 Cir. 1959), *cert. den.* 361 U.S. 938. So much is conceded by the Government, U.S. Br. 24. *Black* is sound and well-reasoned authority — it should be followed by this Court.

II.

The indictment is insufficient (Reply to U.S. Br. pp. 25-34):

1. The indictment does not charge all the basic elements of the offense of attempted tax evasion.

The Government has utterly failed to come forth with any authority or tenable reasoning which would render the indictment valid in the face of its fatal failure to charge (1) existence of a tax deficiency *and* (2) knowledge thereof by the accused — essential elements of the offense. Lack of a direct and express charge of *either* element renders the indictment void. Being unable to find *any* allegation as to the amount of tax paid by the corporation, much less an allegation that there was an *underpayment* of tax, the Government argues, U.S. Br. 31, that the amount of payment —

and consequently existence of a deficiency — is an element which must only be proved at trial, and need not be charged in the indictment. That argument is without any foundation or authority. There is no conceivable basis for any distinction or difference between the basic elements of an offense which must be proved and the elements which must be charged in the indictment. *All* the basic or essential elements of an offense must be *both* charged in the indictment *and* proved at trial.

Equally fallacious is the Government's *unsupported* contention, U.S. Br. 33-34, that the conspiracy count is not required to allege the bare essential elements of the substantive offense alleged to be the object of the criminal conspiracy sought to be charged. In *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927), relied upon by the Government, it was stated only that the elements need not be charged with the "technical precision" required in an indictment for the substantive offense. That statement cannot be construed to countenance an *utter failure* to even mention essential elements of the substantive offense. Furthermore, in both *Wong Tai* and *Williamson* v. *United States*, 207 U.S. 425, 446-449 (1908), cited therein, it appears that the elements of the substantive offenses were charged in considerable detail, whereas the elements of a tax deficiency and knowledge thereof are wholly lacking in Count 5 of the instant indictment. Count 5 thus fails to charge an offense, *United States* v. *Strauss*, 283 F. 2d 155, 158 (5 Cir. 1960).

2. The indictment wholly fails to apprise the accused employees of the "nature and cause of the accusation" of attempted evasion of corporate income taxes within the meaning of the Sixth Amendment.

The Government's characterization of Petitioners' posi-

tion as a "claim only that the indictment should have been more specific in order to apprise them of the precise offenses charged" is wholly erroneous, as is its misplaced reliance upon the skeleton "bill of particulars" gratuitiously filed by the prosecution. U.S. Br. 26, 28. We are not complaining of mere lack of "specificity"; our position is that the indictment is *fatally defective* because of its failure to charge essential elements of the offense and its failure to comply with the Sixth Amendment. A fatally defective indictment cannot be cured by a bill of particulars under any circumstances. *Babb* v. *United States*, 218 F. 2d 538, 539 (5 Cir. 1955); *United States* v. *Lattimore*, 215 F. 2d 847, 850 (D.C. Cir. 1954); *White* v. *United States*, 67 F. 2d 71, 78 (10 Cir. 1933). The prosecutor cannot take the place of a grand jury. Cf. *Stirone* v. *United States*, 361 U.S. 212 (1960).

III.

Contrary to the Sixth Amendment, Petitioners were tried in absentia. By basing the convictions and sentences upon evidence adduced at the Farnsworth trial, the District Court rejected the pleas of nolo contendere and lost jurisdiction to convict and sentence Petitioners upon such pleas (Reply to U. S. Br. pp. 34-37).

Conceding that Petitioners "may have been deprived of their rights under the Sixth Amendment" if they were sentenced on evidence adduced at the Farnsworth trial, U.S. Br. 35, the Government states that the District Court nevertheless had jurisdiction. However, it fails to state how or under what authority the jurisdiction to convict and sentence Petitioners could have been retained, after their *nolo contendere* pleas were in legal effect rejected, when no pleas to the indictment were legally outstanding. We submit that jurisdiction was clearly lacking.

Admittedly the record does not necessarily compel the conclusion that Petitioners were sentenced solely upon the Farnsworth evidence. Nevertheless, the statements of the District Court and the prosecution, together with all the circumstances of the case, are *abundantly sufficient* to raise a reasonable inference that they were sentenced upon such evidence and were actually tried *in absentia*. We submit that any reasonable doubt on this score left by the unavoidably inadequate record should be resolved in Petitioners' favor.

IV.

Since the written judgments adjudged that Petitioners were convicted of misdemeanor offenses, imposition of prison sentences for felony offenses was beyond the jurisdiction of the District Court (Reply to U.S. Br. pp. 37-41).

The Government's unsupported contention that the language of the judgments does not describe an offense under Section 145(a) of the 1939 Code, or Section 7203 of the 1954 Code, U.S. Br. 39n.13, is wrong. A similar contention was squarely demolished in *United States* v. *McCue*, 160 F. Supp. 595, 599 (D.C. Conn. 1958):

> ". . . The test to be employed in determining whether or not the 145(a) violation is a lesser included offense in the 145(b) violation is whether or not it is possible to commit the greater offense without having first committed the lesser. [Citation omitted.]
>
> "Considering the misdemeanor offense in relation to the felony offense charged in each count of the indictment, the question is whether or not it is possible to attempt to evade federal income taxes by filing a false return without failing to supply correct information for the purpose of computation, assessment or collection of federal income taxes. It seems clear when the offenses are analyzed that 'failure to supply correct

information' is necessarily violated when 'attempt to evade by filing a false return' is violated. The Government at the hearing and in its memorandum has offered no explanation or examples of how the attempt to evade by filing a false return can be accomplished without, necessarily and as a material element thereof, also failing to supply correct information."

It is clear beyond any possible doubt that the language of the judgments precisely describes the misdemeanor offense set out in Section 7207 of the 1954 Code.

Although the Government, without citing authority, argues that the oral, not the written, sentence governs, it also states that in other cases before the Court this term (Nos. 180 and 184) it is maintaining that the accuracy of written judgments cannot be impeached. U.S. Br. 40, 41. Rule 32(b) clearly contemplates that judgments shall be written -- it even provides that "the judgment shall be signed by the judge."

CONCLUSION

WHEREFORE, Petitioners respectfully pray as in their first brief.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 238.—October Term, 1960.

H. A. Lott, et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1961.]

Mr. Justice Whittaker delivered the opinion of the Court.

This case is concerned with the timeliness of an appeal from a judgment of conviction and sentence in a criminal case under Rule 37 (a)(2) of the Federal Rules of Criminal Procedure.[1]

These three petitioners having been jointly indicted, with two others, on five counts in the United States District Court for the Southern District of Texas for willfully attempting and conspiring to evade the federal income taxes of their corporate employer,[2] entered, and

[1] "Rule 37

"TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI

"(a) Taking Appeal to a Court of Appeals.

"(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . ."

[2] The corporate employer and taxpayer was Farnsworth & Chambers Co., Inc. Petitioners were employee-officers of that corporation, and collectively owned approximately 7 percent of its issued and outstanding capital stock. The first four counts of the indictment

the court accepted pleas of *nolo contendere* on March 17, 1959. But the court decided that pronouncement of its judgment should await conclusion of the impending jury trial of the other two defendants.[3] Soon after the conclusion of that rather protracted trial, the court, on June 19, 1959, orally pronounced its judgment convicting petitioners and sentencing them to imprisonment.[4] Three days later, on June 22, formal judgment was prepared, signed by the judge and filed with the clerk. The next day, June 23, petitioners filed their separate "motion[s] in arrest of judgment."[5] Those motions were denied on July 13. Two days later, on July 15, petitioners filed their separate notices of appeal from the judgment to the United States Court of Appeals for the Fifth Circuit.[6]

On the Government's motion, that court dismissed the appeals as untimely under Rule 37 (a)(2). 280 F. 2d 24. It held, in effect, that, although there is no such express limitation in the Rules, the provisions of

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charged willful attempt to evade the corporation's income taxes for the years 1951, 1952, 1953 and 1954, respectively, and the fifth count charged a conspiracy to commit the four substantive offenses charged.

[3] The two codefendants who stood trial were Richard A. Farnsworth, Sr., and his son. They owned a major part of the corporation's capital stock. Their trial, which began on April 6, 1959, and continued through June 9, resulted in a verdict of acquittal of the son on all counts, and a failure of the jury to agree on any of the counts as to the father.

[4] Petitioners were sentenced to imprisonment—Blocker for three years, Lott and Frazier for two years, on each count, the sentences to run concurrently, and each was fined $20,000.

[5] Each of the motions in arrest prayed, *inter alia*, "that the judgment and sentence . . . be arrested and set aside, that the indictment . . . be dismissed, and that [there] be granted such other relief as justice may demand."

[6] Actually, only Lott appealed on July 15. Blocker and Frazier appealed two days later, on July 17.

Rule 34[1] impliedly modify and limit the provisions of Rule 37 (a)(2). And it concluded that, although "motion[s] . . . in arrest of judgment" had, in fact, "been made within the 10-day period" after entry of the judgment appealed from (Rule 37 (a)(2)), it cannot be so regarded under these Rules because the tender by petitioners and acceptance by the court of the pleas of *nolo contendere* on March 17 constituted the "determination of [their] guilt," and, inasmuch as the motions in arrest were not made "within 5 days after [that] *determination of guilt*" as required by Rule 34, it followed that, to be timely under Rule 37 (a)(2), the appeals had to "be taken within 10 days after entry of the judgment or order appealed from" (Rule 37 (a)(2)), or by June 30 or July 2—depending upon whether it was the oral pronouncement of June 19 or the formal entry of June 22 that constituted the judgment—and not "within 10 days after entry of the order denying the motion." (Rule 37 (a)(2).) 280 F. 2d, at 27–28. Because of a conflict between the circuits upon the question presented[2] and of its importance to the proper administration of the criminal Rules, we granted certiorari. 364 U. S. 813.

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[1] "*Rule 34. Arrest of Judgment.*

"The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."

[2] In accord with the decision below is *United States* v. *Bertone*, 249 F. 2d 156 (C. A. 3d Cir.). And see *O'Neal* v. *United States*, 264 F. 2d 809 (C. A. 5th Cir.); *Drown* v. *United States*, 198 F. 2d 999 (C. A. 9th Cir.); *Godwin* v. *United States*, 185 F. 2d 41 (C. A. 8th Cir.). To the contrary are *Lujan* v. *United States*, 294 F. 2d 171 (C. A. 10th Cir.); *Smith* v. *United States*, 253 F. 2d 462 (C. A. 10th Cir.); and see *Sullivan* v. *United States*, 212 F. 2d 125 (C. A. 10th Cir.), affirmed, 348 U. S. 170.

Buttressed by *Lujan* v. *United States*, 204 F. 2d 171 (C. A. 10th Cir.), and *Smith* v. *United States*, 273 F. 2d 462 (C. A. 10th Cir.), holding, on similar facts, that Rule 37 (a)(2) alone and unaffected by any other Rule prescribes the time within which an appeal must be taken to a Court of Appeals in a criminal case, and further buttressed by their belief that this Court, too, so held, even if *sub silentio*, in exercising jurisdiction, under facts virtually identical to those here, in *Sullivan* v. *United States*, 348 U. S. 170, petitioners point to the facts that Rule 37 (a)(2) is captioned "*Time for Taking Appeal*"; that it is the only Rule that purports to deal with the subject; that it does not speak of motions filed within five days, nor after "verdict or finding of guilty" (Rule 33), nor after "determination of guilt" (Rule 34)—whatever that term may mean—and makes no reference to timeliness, under any other Rule, of the motions of which it speaks, but that it simply says in plain and unmistakable language that "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion . . . in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." Then, after pointing to the admitted fact that their motions in arrest were "made within the 10-day period"—actually within three days—after entry of the judgment appealed from, and that they appealed on the second day after their motions were denied, petitioners strenuously insist that their appeals were timely. They contend that to hold their appeals to have been untimely, in these circumstances, would be to mutilate the plain language of Rule 37 (a)(2) and to make of it a trap even for the wary—including their experienced and competent counsel who were doing their best to protect petitioners' rights of appeal. And they insist that such a snare

should not be permitted to deprive one of the valuable right of an appeal upon which his liberty, or even his life, may well depend.

Though we are impressed by this demonstration and argument, as also by the legalisms of the Government's countervailing argument, and although recognizing, as we do, the obscurity, if not inconsistency, in these Rules that has been exposed by this case, we need not here decide whether Rules 33 and 34 modify Rule 37 (a)(2) so as to limit the time which it specifies for the taking of an appeal—but may and should leave that problem and its kindred ones, brought to the fore in this case, for resolution by the rule-making process.* *United States* v. *Robinson*, 361 U. S. 220—for we have concluded that it was the judgment of conviction and sentence, not the tender and acceptance of the pleas of *nolo contendere*, that constituted the "determination of guilt" within the meaning of Rule 34. And, inasmuch as the motions in arrest were "made within 5 days after [that] determination of guilt," as required by Rule 34, and thus, in any view, were also "made within the 10-day period" after entry of the judgment appealed from, as required by Rule 37 (a)(2), the appeal, taken "within 10 days after entry of the order denying the motion," was timely.

Although it is said that a plea of *nolo contendere* means literally "I do not contest it," *Piassick* v. *United States*, 253 F. 2d 658, 661, and "is a mere statement of unwillingness to contest and no more," *Mickler* v. *Fahs*, 243 F. 2d 515, 517, it does admit "every essential element of the offense [that is] well pleaded in the charge." *United*

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*In light of the confusion that has arisen under these Rules, as exposed by this case, it is hoped that those who advise the Court with respect to the exercise of its rule-making powers—more particularly of course the Judicial Conference of the United States (28 U. S. C. § 331) and the Advisory Committee on Federal Rules of Criminal Procedure—will give these problems their early attention.

States v. *Lair*, 195 F. 47, 52 (C. A. 8th Cir.). Cf. *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 296. Hence, it is tantamount to "an admission of guilt for the purposes of the case," *Hudson* v. *United States*, 272 U. S. 451, 455, and "nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record." *United States* v. *Norris*, 281 U. S. 619, 623. Yet the plea itself does not constitute a conviction nor hence a "determination of guilt." It is only a confession of the well-pleaded facts in the charge. It does not dispose of the case. It is still up to the court "to render judgment" thereon. *United States* v. *Norris*, *supra*, at 623. At any time before sentence is imposed—*i. e.*, before the pronouncement of judgment—the plea may be withdrawn, with the consent of the court. Rule 32 (d), Fed. Rules Crim. Proc. Necessarily, then, it is the judgment of the court—not the plea—that constitutes the "determination of guilt." Apart from the opinion below, we have not been cited to any case, and have found none, that holds or even intimates the contrary.

In view of this disposition of the jurisdictional question, we need not decide petitioners' alternative contentions that their motions in arrest should be treated as motions under Rule 12 (b)(2) of the Federal Rules of Criminal Procedure (see *Finn* v. *United States*, 256 F. 2d 304, 306 (C. A. 4th Cir.); *Hotch* v. *United States*, 208 F. 2d 244, 250 (C. A. 9th Cir.); *United States* v. *Holmes*, 110 F. Supp. 233, 234 (D. C. S. D. Tex.)), or as motions to vacate sentences under 28 U. S. C. § 2255 (see *Marteney* v. *United States*, 216 F. 2d 760 (C. A. 10th Cir.); *Finn* v. *United States*, *supra*).

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 238.—October Term, 1960.

H. A. Lott, et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1961.]

Mr. Justice Clark, with whom Mr. Justice Frankfurter, Mr. Justice Harlan and Mr. Justice Stewart join, dissenting.

The Court characterizes "determination of guilt," as used in Rule 34,[1] by the significant phrase, "whatever that term may mean." It then finds that the acceptance of a *nolo contendere* plea is not such a determination. I submit that this Court has held that acceptance of such a plea is a "determination of guilt," and that today's decision is not only contrary to prior cases, but is also out of tune with the long-accepted practice of both federal and state courts. Believing that it will result in such confusion as to the requirements of our Rules that the administration of criminal justice will be adversely affected, I must respectfully dissent.

At the time petitioners Blocker and Frazier offered their pleas (March 17), the Government objected to their acceptance by the court, as it did when Lott offered his (March 20). The court heard counsel and warned the parties of the seriousness of the charge, *i. e.*, that the charge was willful tax avoidance, that the plea was volun-

[1] Rule 34 states in pertinent part that "[t]he motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the Court may fix during the 5-day period."

tarily made without promises, and that the sentence might be five years' confinement in addition to a large fine. After being assured by each of the parties that he wished to enter his plea, the court accepted them. Orders were entered in the minutes of the court as to each defendant, accepting the pleas and directing that a "pre-sentence investigation" be undertaken "for sentence at conclusion of entire case." The delay as to sentence was occasioned by the awaited trial of two additional defendants who had pleaded not guilty. The record shows that on June 19, after that trial was concluded (one defendant being acquitted and the other having a hung jury), petitioners appeared in court "on the criminal action docket *for sentence* . . . ." (Emphasis added.) The court, in addressing the parties, said, "[a]ll three of you have entered a plea of nolo contendere, and *that is equivalent to a plea of guilty.*" (Emphasis added.) Neither counsel nor the parties made any comment on this characterization of their pleas. Thereafter, petitioners and their counsel made statements in mitigation, after which sentence was pronounced. At no time were any motions made for permission to withdraw the pleas. On June 22, the formal judgments and commitments on the sentences were entered and each petitioner filed a motion in arrest of judgment on the next day. It is these motions that the Court of Appeals held should have been filed within five days of the acceptance of the pleas of *nolo contendere* in March. The Court, however, holds that the crucial date on which the "determination of guilt" was made was the day of the judgment of conviction and sentence.[2] Since the motions in arrest came within five days there-

[2] Whether this date is June 19, when the court orally pronounced sentence, or June 22, when the court formally entered judgments and commitments, is not made clear for under the Court's rationale, these appeals would be timely if either date were considered that of the "determination of guilt."

after, the Court says they were timely under Rule 34, as were the appeals that followed, under Rule 37 (a)(2).[3]

Rule II (2) of the Criminal Appeals Rules, 1933, 292 U. S. 661, the predecessor of present Rule 34, stated that "motions in arrest of judgment shall be made within three days after verdict or finding of guilt." Certainly "verdict" referred to a jury verdict of guilt. A plea of guilty has always been considered the equivalent of a jury finding of guilty. See *United States* v. *Norris*, 281 U. S. 619 (1930); *United States* v. *Bradford*, 194 F. 2d 197. The same is true of a plea of *nolo contendere*. Our cases have long and consistently held that it, "like a plea of guilty, is an admission of guilt for the purposes of the case." *Hudson* v. *United States*, 272 U. S. 451, 455 (1926). As this Court said in *United States* v. *Norris*, *supra*, after its entry, "the plea of *nolo contendere* upon that question [of guilt or innocence] and for that case, was as conclusive as a plea of guilty would have been. The court was no longer concerned with the question of guilt, but only with the *character and extent of the punishment*. The remedy of the accused . . . was to withdraw, by leave of court, the plea of *nolo contendere* . . . ." At p. 623. (Emphasis added.)

Rule 34, the successor to Rule II (2), is likewise clear and unambiguous—it says the motion must be filed within five days of "determination of guilt," not the time

[3] While the Court does not place its decision solely on the language of Rule 37 (a)(2), it is well to note that under that Rule an appeal must be taken "within ten days after entry of the judgment." If, however, a motion "in arrest of judgment has been made within the ten day period" the appeal period is tolled until the motion is overruled. Petitioners argue that since their motions in arrest were filed within the "ten day period" subsequent to judgment and were not overruled until July 13, their appeals (filed July 17) are timely. I assume that the Court considers this contention—making Rule 34 mere surplusage—entirely untenable since it specifically refuses to pass upon it.

of judgment or sentence. The Court today, however, rewrites the Rule by holding that the judgment date is the controlling one. "[I]t is the judgment of the court . . . that constitutes the 'determination of guilt.'" *Ante*, p. —. It has, however, long been recognized that determination of guilt and entry of judgment are disparate. *United States v. Norris, supra;* Fed. Rules Crim. Proc., 32 (b). If the framers of the Rules had intended to have the time for filing the motion in arrest run from the date of judgment, they would have said so. Instead they said that Rule 34 "*continues existing law* except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days. See Rule II (2) of Criminal Appeals Rules of 1933, 292 U. S. 661."[4] (Emphasis added.) "Existing law" did not allow motions in arrest unless made within three days of "verdict or finding of guilt."

The majority notes petitioner's argument that *Sullivan* v. *United States*, 348 U. S. 170 (1954), supports today's decision "even if *sub silentio*." With due deference, I say it does not. No question of jurisdiction was raised or considered in that case, either in the Court of Appeals or in this Court.[5] The case dealt solely with the merits of motions to dismiss and to withdraw a plea of *nolo contendere* under Rule 32 (d) after sentence.

The Court attempts to bolster its decision by noting that a *nolo contendere* plea "does not constitute a conviction," that it "does not dispose of the case" and that "[i]t is still up to the court 'to render judgment' thereon." However, these statements are just as true when a guilty plea is accepted or the jury returns a verdict of guilty.

[4] S. Doc. No. 175, 79th Cong., 2d Sess. 56.

[5] Petitioner's plea of *nolo contendere* was entered on April 8 and immediately accepted by the court. His motion in arrest of judgment was filed on May 29 and denied on June 23. The District Court gave no reason for its denial. The appeal was filed June 23.

They certainly were equally true under former Rule II (2). The judgment sentencing and committing the defendant in each of these instances would still have to be entered. In actual practice, then, nothing more is left to be done by the court after accepting a *nolo contendere* plea than is necessary after accepting a guilty plea or after a jury returns a verdict of guilty. In each of the three situations, guilt has been determined upon the acceptance by the court of the respective pleas or of the verdict of the jury. In each case, motions to withdraw the pleas or to set aside the verdict may be made, and might be granted, but their availability does not alter the fact that, until any such motion is granted, there has been a determination of guilt.

It appears rather unseemly to me for the Court to enlarge, through judicial decision, the time for filing motions in arrest and, in consequence, that for taking an appeal. Only last Term, we said in *United States* v. *Robinson*, 361 U. S. 220, 229 (1960), that this should be effected "through the rule-making process . . . ." As was pointed out there, Rule 45 (b) specifically provides that "the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal." The Court has, by today's opinion, enlarged the time provided in these Rules, contrary to their express provision, contrary to our prior cases, and contrary to the long-established practice at the Bar. In so doing, it places these Rules in a state of utter confusion, and must thereby surely drive the Bar and the trial courts to procedural distraction. I would affirm.